RECORD AND BRIEFS

17 586

FILED
OCT 17 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No.

In the Supreme Court of the United States

GREG ABBOTT, ET AL, APPELLANTS,

v.

SHANNON PEREZ, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

JURISDICTIONAL STATEMENT

PAUL D. CLEMENT
ERIN E. MURPHY

KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant
Attorney General

SCOTT A. KELLER
Solicitor General
Counsel of Record

MATTHEW H. FREDERICK
Deputy Solicitor General

MICHAEL P. MURPHY
ANDREW B. DAVIS
Assistant Solicitors General

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
scott.keller@oag.texas.gov
(512) 936-1700

QUESTIONS PRESENTED

1. Whether the district court issued an appealable interlocutory injunction when it invalidated Texas' duly enacted redistricting plan and ordered the parties to appear at a remedial hearing to redraw state congressional districts unless the Governor called a special legislative session to redraw the congressional map within three days.

2. Whether the Texas Legislature acted with an unlawful purpose when it enacted a redistricting plan originally imposed by the district court to remedy any potential constitutional and statutory defects in a prior legislative plan that was repealed without ever having taken effect.

3. Whether the Texas Legislature engaged in intentional vote dilution when it adopted Congressional District 27 in 2013 after the district court found, in 2012, that CD27 did not support a plausible claim of racially discriminatory purpose and did not dilute Hispanic voting strength because it was not possible to create an additional Hispanic opportunity district in the region.

4. Whether the Legislature engaged in racial gerrymandering in Congressional District 35 when it simply adopted the district unchanged as part of the court-ordered remedial plan.

PARTIES TO THE PROCEEDING

Plaintiffs in the district court are Shannon Perez, Gregory Tamez, Nancy Hall, Dorothy DeBose, Carmen Rodriguez, Sergio Salinas, Rudolfo Ortiz, Lyman King, Armando Cortez, Socorro Ramos, Gregorio Benito Palomino, Florinda Chavez, Cynthia Valadez, Cesar Eduardo Yevenes, Sergio Coronado, Gilberto Torres, Renato De Los Santos, Jamaal R. Smith, Debbie Allen, Sandra Puente, Kathleen Maria Shaw, TJ Carson, Jessica Farrar, Richard Nguyen Le, Wanda F. Roberts, Mary K. Brown, Dottie Jones, Mexican American Legislative Caucus - Texas House of Representatives (MALC), Texas Latino Redistricting Task Force, Joey Cardenas, Alex Jimenez, Emelda Menendez, Tomacita Olivares, Jose Olivares, Alejandro Ortiz, Rebecca Ortiz, Margarita V Quesada, Romeo Munoz, Marc Veasey, Jane Hamilton, John Jenkins, Eddie Rodriguez, City of Austin, Constable Bruce Elfant, Travis County, David Gonzalez, Milton Gerard Washington, Alex Serna, Sandra Serna, Betty F. Lopez, Beatrice Saloma, Joey Martinez, Lionor Sorola-Pohlman, Balakumar Pandian, Nina Jo Baker, Juanita Valdez-Cox, Eliza Alvarado, the League of United Latin American Citizens (LULAC), Henry Cuellar, Texas State Conference of NAACP Branches, Howard Jefferson, Bill Lawson, Eddie Bernice Johnson, Sheila Jackson-Lee, Alexander Green, United States of America, Rod Ponton, Pete Gallego, Filemon Vela, Jr., Gabriel Y. Rosales, Belen Robles, Ray Velarde, Johnny Villastrigo, Bertha Urteaga, Baldomero Garza, Marcelo H. Tafoya, Raul Villaronga, Asenet T. Armadillo, Elvira Rios, Patricia Mancha, and Juan Ivett Wallace.

Defendants in the district court are Greg Abbott, in his official capacity as Governor of Texas, Rolando Pablos, in his official capacity as Texas Secretary of State, the State of Texas, Steve Munisteri, in his official capacity as Chair of the Texas Republican Party, Boyd Richie, Gilberto Hinojosa, in his official capacity as Chair of the Texas Democratic Party, and Sarah M. Davis.

TABLE OF CONTENTS

Page

Questions presented I
Parties to the proceeding II
Jurisdictional Statement 1
Opinion below 3
Jurisdiction 3
Constitutional and statutory provisions involved 3
Statement 4
The Court should note probable jurisdiction or summarily reverse 11
I. This Court has jurisdiction to review the district court's order. 12
II. The Legislature did not act with an unlawful purpose when it adopted the court-drawn map as its own 15
A. The district court applied a fundamentally flawed legal test and reached a fundamentally flawed conclusion. 15
B. The district court's intentional discrimination finding defies law, logic, and fact. 21
III. Plan C235 is not and never was infected by any discriminatory "taint." 25
A. The district court's "taint" finding is grounded in an impermissible advisory opinion. 25
B. There is not and never was any vote dilution in CD27. 29
C. CD35 is not a racial gerrymander 32

Conclusion 35

TABLE OF AUTHORITES

Cases:

Abbott v. Perez,
No. 17A225, 2017 WL 3695678 (Aug. 28, 2017) (Alito, J., in chambers) 10

Abbott v. Perez,
No. 17A225, 2017 WL 4014835 (Sept. 12, 2017) ... 3, 10

Abrams v. Johnson,
521 U.S. 74 (1997) 6

Ala. Legis. Black Caucus v. Alabama,
135 S. Ct. 1257 (2015) 32

Bartlett v. Strickland,
556 U.S. 1 (2009) 29, 30

Bethune-Hill v. Va. State Bd. of Elections,
137 S. Ct. 788 (2017) 31, 32, 34, 35

Branch v. Smith,
538 U.S. 254 (2003) (Kennedy, J., concurring) 26

Bush v. Vera,
517 U.S. 952 (1996) 23

Calderon v. U.S. Dist. Ct. for Cent. Dist. of Cal.,
137 F.3d 1420 (9th Cir. 1998) 14

Carson v. Am. Brands, Inc.,
450 U.S. 79 (1981) 12, 14

Chapman v. Meier,
420 U.S. 1 (1975) 17

Cohen v. Bd. of Trs. of the Univ. of Med. & Dentistry of N.J.,
867 F.2d 1455 (3d Cir. 1989) (en banc) 14

Cases—Continued:

Connor v. Waller,
421 U.S. 656 (1975) (per curiam) 26

Cooper v. Harris,
137 S. Ct. 1455 (2017) 32, 35

Davis v. Abbott,
781 F.3d 207 (5th Cir.), *cert. denied*,
136 S. Ct. 534 (2015) 9, 25

Etuk v. Slattery,
936 F.2d 1433 (2d Cir. 1991) 12

Growe v. Emison,
507 U.S. 25 (1993) 30

Hunt v. Cromartie,
526 U.S. 541 (1999) 32

Johnson v. De Grandy,
512 U.S. 997 (1994) 29

LULAC v. Perry,
133 S. Ct. 96 (2012) 7

LULAC v. Perry,
548 U.S. 399 (2006) 18, 29, 33

McCutcheon v. FEC,
134 S. Ct. 1434 (2014) 12

Miller v. Johnson,
515 U.S. 900 (1995) 15, 16, 17, 32, 33

Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle,
429 U.S. 274 (1977) 16

Perez v. Abbott,
No. 5:11-cv-360, 2017 WL 3495922
(W.D. Tex. Aug. 15, 2017) 3

Cases—Continued:

Perry v. Perez,
565 U.S. 1090 (2011) 5

Perry v. Perez,
565 U.S. 388 (2012) (per curiam) ..... *passim*

Pers. Adm'r of Mass. v. Feeney,
442 U.S. 256 (1979) 16, 31

Salazar ex rel. Salazar v. Dist. of Columbia,
671 F.3d 1258 (D.C. Cir. 2012) 12, 14

Shaw v. Reno,
509 U.S. 630 (1993) 15, 29, 31

Shelby County v. Holder,
133 S. Ct. 2612 (2013) 8

Texas v. United States,
133 S. Ct. 2885 (2013) (mem.) 8

Texas v. United States,
883 F. Supp. 2d 133 (D.D.C. 2012), *vacated*,
133 S. Ct. 2885 (2013) 7, 31-32

Thomas ex rel. D.M.T. v. Sch. Bd. St. Martin Par.,
756 F.3d 380 (5th Cir. 2014) 12

Thompson v. N. Am. Stainless, LP,
562 U.S. 170 (2011) 28

Thornburg v. Gingles,
478 U.S. 30 (1986) 30

Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens,
529 U.S. 765 (2000) 27, 28

Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.,
429 U.S. 252 (1977) 16

Cases—Continued:

White v. Weiser,
412 U.S. 783 (1973) 6

Wise v. Lipscomb,
437 U.S. 535 (1978) 14

Statutes:

28 U.S.C.
§1253 ..... 3, 12
§1292(a) 12
§2284 4

52 U.S.C.
§10301 3
§10304 4

Miscellaneous:

Order, *Perez v. Abbott*, No. 5:11-cv-360
(W.D. Tex. Aug. 18, 2017) 13

Proclamation by the Governor,
No. 41-3324 (May 27, 2013) 8

In the Supreme Court of the United States

No. _____

GREG ABBOTT, ET AL, APPELLANTS,

v.

SHANNON PEREZ, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

JURISDICTIONAL STATEMENT

Five years ago, this Court ordered the three-judge district court in this case "to draw interim maps" for the State of Texas' 2012 congressional elections "that do not violate the Constitution or the Voting Rights Act." *Perry v. Perez*, 565 U.S. 388, 396 (2012) (per curiam). The district court followed this Court's command when it formulated remedial maps and ordered the State to conduct its 2012 congressional elections under a court-ordered remedial plan known as Plan C235. As the district court explained in a detailed opinion in 2012, Plan C235 addressed all of the statutory or constitutional deficiencies that had been identified in the Texas Legislature's initial 2011 map.

While Texas could have continued to pursue the litigation necessary to employ its duly enacted 2011 maps in subsequent elections, the State opted for a more conciliatory approach in an attempt to end this litigation: it accepted the district court's decision and adopted the court-ordered remedial plan as its own. In 2013, the

Texas Legislature repealed the 2011 congressional plan and enacted the court-ordered Plan C235 into law. The 2011 plan therefore never took legal effect: it was formally repealed before it was ever used to conduct a single election. Subsequent elections would be held under a remedial map adopted by the court and now bearing the imprimatur of the Legislature.

The plaintiffs amended their complaints to assert claims against the newly enacted Plan C235, but instead of moving on to pursue their claims against Plan C235—the only live plan, and the only map that had actually been used in a congressional election—the district court allowed the plaintiffs to continue pursuing their moot claims against the repealed 2011 congressional plan. The district court spent nearly four years adjudicating claims against the defunct and never-employed 2011 plan, finally issuing a decision in March 2017. While the court was adjudicating claims against the long-dead 2011 plan, Texas held two more elections under Plan C235.

Now, five years and three election cycles after *ordering* Texas to use Plan C235, that very same court has held that the Legislature engaged in intentional discrimination and racial gerrymandering when it enacted legislation adopting the court-ordered remedial plan as its own. The district court did not actually find that the 2013 Legislature deliberately enacted Plan C235 to harm minority voters or that it actually relied on race to sort voters into different districts. Nor could it. Instead, the district court faulted the Legislature for failing to remove the discriminatory "taint" from the 2011 plan, even though the district court's own order implementing Plan

C235 explained that the district court itself had already done exactly that, as instructed by this Court.

This Court has already stayed the district court's order pending appeal. *Abbott v. Perez*, No. 17A225, 2017 WL 4014835 (Sept. 12, 2017). The Court's plenary review is warranted to reverse the district court's novel constitutional-for-the-courts-but-not-for-the-Legislature theory, which is plainly wrong, but at a minimum presents substantial questions for this Court's review.

OPINION BELOW

Appellants appeal the three-judge district court's Order on Plan C235, *Perez v. Abbott*, No. 5:11-cv-360, 2017 WL 3495922 (W.D. Tex. Aug. 15, 2017), J.S. App. 3a-119a. That order incorporated the district court's prior findings of fact and order on the 2011 map. *Id.* at 14a n.13.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1253. *See infra* Part I. Appellants filed their notice of appeal on August 18, 2017, J.S. App. 1a-2a. The Court has jurisdiction to consider claims regarding the currently operative Plan C235, but claims against the repealed 2011 map are moot.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This appeal involves the Fourteenth Amendment and §2 of the Voting Rights Act (VRA), 52 U.S.C. §10301. The relevant provisions are reproduced in the appendix to this petition. *See* J.S. App. 426a-428a.

STATEMENT

A. In 2011, the Texas Legislature enacted reapportionment plans for Texas state legislative and congressional districts. Before the Legislature even enacted these redistricting plans, however, the plaintiffs filed this lawsuit raising claims against the State under the Constitution and VRA §2, and the Chief Judge of the Fifth Circuit constituted a three-judge district court under 28 U.S.C. §2284.

VRA §5 prevented the 2011 plans from taking legal effect until they were precleared. *See* 52 U.S.C. §10304. Texas filed suit in the United States District Court for the District of Columbia seeking preclearance. Unless and until preclearance was granted, claims against the 2011 plans under the Constitution and VRA §2 remained unripe, leaving the district court here without subject-matter jurisdiction to rule on the merits. The 2011 plans were never precleared.

B. While the preclearance lawsuit was pending, the Texas three-judge district court here conducted a two-week trial beginning on September 6, 2011, regarding the constitutional and VRA §2 claims against the 2011 maps. Because a final judgment in the preclearance litigation seemed unlikely to come in time for the 2012 election cycle, the district court ordered the parties to submit proposed interim plans for the 2012 elections.

In November 2011, by a 2-1 vote with Judge Smith dissenting, the district court ordered the 2012 congressional elections to be conducted under a court-ordered plan (C220). Concluding that it "was not required to give

any deference to the Legislature's enacted plan," the district court announced that it had drawn an "independent map" based on "neutral principles that advance the interest of the collective public good." *Perez*, 565 U.S. at 396.

Texas moved to stay that interim plan pending appeal. On December 9, 2011, this Court granted the State's motion to stay, noted probable jurisdiction, issued an expedited briefing schedule, and set oral argument for January 9, 2012. *Perry v. Perez*, 565 U.S. 1090 (2011) (mem.).

On January 20, 2012, the Court vacated the district court's order in a unanimous opinion. *Perez*, 565 U.S. at 399. The Court held that "the District Court exceeded its mission to draw interim maps that do not violate the Constitution or the Voting Rights Act, and substituted its own concept of 'the collective public good' for the Texas Legislature's determination of which policies serve 'the interests of the citizens of Texas.'" *Id.* at 396.

This Court emphasized that the district court's mission was remedial, not a freewheeling mandate to pursue the collective good, and gave the court specific instructions—six separate times—to implement plans that complied with the Constitution and the VRA:

- "'[F]aced with the necessity of drawing district lines by judicial order, a court, as a general rule, should be guided by the legislative policies underlying' a state plan—even one that was itself unenforceable—'to the extent those policies do not lead to violations of the Constitution or the Voting

Rights Act.'" *Id.* at 393 (quoting *Abrams v. Johnson*, 521 U.S. 74, 79 (1997)).

- "[T]he state plan serves as a starting point for the district court. It provides important guidance that helps ensure that the district court appropriately confines itself to drawing interim maps that comply with the Constitution and the Voting Rights Act, without displacing legitimate state policy judgments with the court's own preferences." *Id.* at 394.
- "A district court making such use of a State's plan must, of course, take care not to incorporate into the interim plan any legal defects in the state plan." *Id.* (citing *Abrams*, 521 U.S. at 85-86; *White v. Weiser*, 412 U.S. 783, 797 (1973)).
- "[A] district court should still be guided by [the State's] plan, except to the extent those legal challenges are shown to have a likelihood of success on the merits." *Id.*
- The district court should "take guidance from the lawful policies incorporated in such a[n unprecleared] plan." *Id.* at 395.
- The district court's "mission [is] to draw interim maps that do not violate the Constitution or the Voting Rights Act." *Id.* at 396.

C. On remand, the district court adopted and imposed Plan C235 as an interim remedial plan for the congressional redistricting. J.S. App. 367a-423a. Plan C235 reconfigured nine challenged districts from the Legisla-

ture's 2011 plan. But Plan C235 retained without reconfiguration CD27, a district around Corpus Christi, and CD35, a district between Austin and San Antonio. J.S. App. 408a, 419a.

In a 56-page opinion, the district court concluded that Plan C235 "sufficiently resolves the 'not insubstantial' § 5 claims and that no § 2 or Fourteenth Amendment claims preclude its acceptance under a preliminary injunction standard." *Id.* at 396a. The court provided six pages of analysis explaining why CD27 did not intentionally dilute minority voting strength, and another seven pages explaining why CD35 was not a racial gerrymander. *See id.* at 408a-415a, 417a-423a.

D. After the D.C. district court denied preclearance to the 2011 plans, *see Texas v. United States*, 883 F. Supp. 2d 133 (D.D.C. 2012), *vacated*, 133 S. Ct. 2885 (2013) (mem.), the State appealed that ruling to this Court. The Texas district court denied a motion by the plaintiffs to modify the court-ordered remedial plan based on the D.C. court's preclearance decision. This Court then denied an application from some plaintiffs to stay Plan C235. *LULAC v. Perry*, 133 S. Ct. 96 (2012) (mem.). The State's 2012 congressional elections were conducted under the district-court-ordered remedial plan.

E. While the State's appeal in the preclearance case was pending, the Texas Attorney General encouraged the Legislature to adopt the district-court-ordered remedial Plan C235 as the State's permanent reapportionment plan. J.S. App. 429a, 431a. On May 27, 2013, the Governor called the Legislature into a special session

"[t]o consider legislation which ratifies and adopts the interim redistricting plans ordered by the federal district court as the permanent plans for districts used to elect members of the Texas House of Representatives, Texas Senate and United States House of Representatives." Proclamation by the Governor, No. 41-3324 (May 27, 2013).

The 2013 Legislature formally repealed the 2011 redistricting plans and adopted verbatim the court-ordered Plan C235 on June 24, 2013. The next day, this Court held VRA §4(b)'s coverage formula unconstitutional, so it could "no longer be used as a basis for subjecting jurisdictions to preclearance." *Shelby County v. Holder*, 133 S. Ct. 2612, 2631 (2013). One day later, the Texas Governor signed into law the bill adopting Plan C235.[1]

F. After the Legislature repealed the 2011 plans, the State moved to dismiss the claims against those plans as moot. J.S. App. 10a. The district court summarily denied the motion without even awaiting a response from the plaintiffs. *Id.* at 11a. The district court then granted the plaintiffs leave to amend their complaints to assert claims against the plans enacted in 2013. But the court also allowed the plaintiffs to continue challenging the repealed 2011 plans, permitting the plaintiffs to amend their pending claims to seek preclearance bail-in under VRA §3—once again rejecting the State's argument that

---

[1] This Court vacated the judgment in the preclearance lawsuit and remanded for further proceedings in light of *Shelby County* and the suggestion of mootness by certain appellees. *Texas v. United States*, 133 S. Ct. 2885 (2013) (mem.).

claims against the repealed 2011 plans were moot. *Id.* The district court also granted a motion to intervene by the United States, which did not assert any claims against Plan C235. *Id.* at 13a. After extensive additional discovery, the district court held a second trial on claims against the repealed Plan C185 in August 2014. *Id.*

G. More than two years later, on March 10, 2017, the district court held by a 2-1 vote that the claims against the repealed 2011 plans were not moot. J.S. App. 122a. The majority then found various violations, including intentional vote dilution in CD27 and racial gerrymandering in CD35. *Id.* at 161a-194a.

Judge Smith dissented, finding these claims moot because the 2011 maps had been repealed and were never in effect. *Id.* at 336a-349a. Judge Smith's reasoning had already been adopted by the Fifth Circuit in a related case involving the State's 2011 redistricting plan for the Texas Senate. *See Davis v. Abbott*, 781 F.3d 207, 220 (5th Cir.), *cert. denied*, 136 S. Ct. 534 (2015) (holding that Texas "repealed the 2011 plan and adopted the district court's interim plan in its place, thus mooting Plaintiffs' lawsuit" and depriving the district court of jurisdiction to vacate its preliminary injunction). Judge Smith also would have upheld CD27 and CD35. J.S. App. 350a.

H. Although the State had repeatedly told the district court that its congressional districts must be set by October 1, 2017, to avoid disruption of deadlines for the November 2018 elections, trial on the operative 2013 congressional map (*i.e.*, Plan C235) did not begin until July 2017. *Id.* at 14a.

On August 15, 2017, the district court issued a divided decision invalidating Plan C235. *Id.* at 14a n.13, 118a. Notwithstanding the fact that the court itself had ordered the State to use Plan C235 five years earlier, and notwithstanding that this plan was adopted by the 2013 Legislature with a different purpose than the 2011 Legislature (resolving the ongoing dispute about the State's congressional districts by embracing the court's remedial plan as its own), the court invalidated CD27 and CD35. It concluded that the State engaged in intentional vote dilution because the remedial plan preserved CD27 in the same form as the 2011 map, and engaged in racial gerrymandering because the remedial plan preserved CD35. *Id.* at 117a-118a.

The court then gave the Governor 72 hours to either order a special session of the Legislature or consult with the State's experts, prepare remedial map proposals, and appear at a hearing on September 5, 2017, to redraw Texas' congressional districts on an expedited basis. *Id.* at 118a-119a.

Texas filed a notice of appeal of the district court's August 15 order on Plan C235. *Id.* at 1a-2a. After the district court denied Texas' stay motion, Justice Alito, acting as Circuit Justice for the Fifth Circuit, entered a temporary stay and requested a response from the plaintiffs. *Abbott v. Perez*, No. 17A225, 2017 WL 3695678 (Aug. 28, 2017) (Alito, J., in chambers). This Court granted a stay "pending the timely filing and disposition of an appeal to this court" on September 12, 2017. *Perez*, 2017 WL 4014835.

THE COURT SHOULD NOTE PROBABLE JURISDICTION OR SUMMARILY REVERSE

According to the district court, the Texas Legislature engaged in intentional discrimination by enacting into law a congressional districting map that the district court itself had ordered the State to use. That bears repeating: the court concluded that the Legislature engaged in *intentional* discrimination by enacting *the court's own remedial map*. That remarkable decision defies law, logic, and fact. Even accepting the court's fundamentally flawed premise that a Legislature must "cleanse" past legislation of the "taint" of a previous Legislature's "discriminatory intent" before adopting it, the Legislature plainly did not act with unlawful purpose when it took the district court at its word that the court's own remedial map did indeed remedy the potential constitutional and VRA violations that the court identified. What was a valid remedy when embraced by the three-judge court does not somehow become intentionally discriminatory when embraced by the State Legislature. The district court's contrary conclusion eviscerates the presumption of good faith to which legislative enactments are entitled, destroys the distinction between discriminatory intent and discriminatory effect, and eliminates what little breathing room legislatures have left to draw districts that comply with the many competing demands that federal and state law impose.

I. This Court Has Jurisdiction to Review the District Court's Order.

This Court has jurisdiction to review the three-judge district court's order because it constitutes an interlocutory injunction, and federal law authorizes a direct appeal to this Court. 28 U.S.C. §1253. The Court has "no discretion to refuse adjudication of the case on its merits" when an appeal is properly brought under §1253. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1444 (2014).

While the district court did not label its order an "injunction," this Court has made clear that appellate jurisdiction turns on the "practical effect" of the lower court's order, not its form or use of magic words. *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 83 (1981) (interpreting 28 U.S.C. §1292(a)). Interpreting *Carson*, lower courts have consistently held that "[e]ven if an order does not by its terms grant or deny a specific request for an injunction . . . the order may still be appealable if it has the 'practical effect' of doing so." *Salazar ex rel. Salazar v. Dist. of Columbia*, 671 F.3d 1258, 1261-62 (D.C. Cir. 2012); *see also, e.g.*, *Thomas ex rel. D.M.T. v. Sch. Bd. St. Martin Par.*, 756 F.3d 380, 384 (5th Cir. 2014); *Etuk v. Slattery*, 936 F.2d 1433, 1440 (2d Cir. 1991).

That is precisely the case here, as the district court's order has the "practical effect" of preventing the State from conducting congressional elections under its duly enacted redistricting plan. The district court held that the "Plan C235 configurations of CD35 and Nueces County/CD27 violate § 2 and the Fourteenth Amendment," J.S. App. 118a, that the violations "*must* be remedied," *id.* (emphasis added), and that if the Legislature

does not redraw the districts, the district court will, *id.* Indeed, the district court gave the Governor a mere 72 hours to decide whether to call the Legislature into special session to draw new maps. And in the event the Governor declined to accede to that demand (and decline, he did), the court ordered the parties to consult with mapdrawing experts, confer on the possibility of agreeing to a remedial plan, and come prepared to offer proposed remedial plans at a hearing to redraw Texas' congressional map on September 5, 2017. *Id.* at 118a-119a. Simply put, there can be no serious dispute that the district court's order enjoins Texas from conducting future congressional elections under Plan C235.

To be sure, the deadlines set by the district court have come and gone without a redrawn map, but that is only because this Court stayed the order. The district court undoubtedly would promptly reschedule the hearing to redraw the map were the stay lifted. In fact, after Justice Alito granted a temporary stay, the district court issued an "advisory" encouraging the parties to continue preparing for its remedial mapdrawing on a "voluntary" basis. *Id.* at 425a. The order thus alters the status quo and disrupts the State's election procedures by forbidding Texas from using C235 in future elections.

The district court's claim that it "has not enjoined [Plan C235's] use for any upcoming elections," Order, *Perez v. Abbott*, No. 5:11-cv-360 (W.D. Tex. Aug. 18, 2017) (ordering the parties "to proceed with preparations for the remedial hearing as previously directed"), is no bar to this Court's jurisdiction. No matter how the

district court labels its order, it is an injunction in substance. If the order were not intended to block the State from using Plan C235—and to do so immediately—there would have been no reason to put the Governor under a 72-hour deadline or to order the parties to rush to redraw maps a mere 21 days after declaring CD27 and CD35 invalid. After all, this Court's precedent requires "afford[ing] a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan." *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (principal op.). The district court's August 15, 2017 order therefore has the practical effect of an injunction blocking Plan C235.

The order satisfies all other aspects of appealability analysis. It "affect[s] predominantly all of the merits," *Salazar*, 671 F.3d at 1262, and alters the status quo, *see Calderon v. U.S. Dist. Ct. for Cent. Dist. of Cal.*, 137 F.3d 1420, 1422 n.2 (9th Cir. 1998); *Cohen v. Bd. of Trs. of the Univ. of Med. & Dentistry of N.J.*, 867 F.2d 1455, 1466 (3d Cir. 1989) (en banc). It is certain to have a "serious, perhaps irreparable, consequence," *Carson*, 450 U.S. at 84, because it invalidates two congressional districts and compels the State to redraw the congressional map. And the order can be "'effectually challenged' only by immediate appeal," *id.*, because appellate review from a final judgment after the imposition of remedial maps would come too late to prevent the irreparable harm of being forced to use a new court-ordered map for the 2018 elections. The practical effect of the district court's order therefore establishes this Court's jurisdiction.

II. The Legislature Did Not Act With An Unlawful Purpose When It Adopted the Court-Drawn Map As Its Own.

The district court invalidated Texas' congressional map on the theory that the Legislature engaged in intentional discrimination when it enacted as its own the same remedial redistricting plan that the district court itself ordered the State to use in 2012. The court reasoned that the Legislature failed to remove the "taint" of discrimination that supposedly lingered from the 2011 plan that the district court's remedial plan replaced—even though that is precisely what the remedial plan was supposed to accomplish under this Court's mandate in *Perry v. Perez*. That extraordinary holding is wrong at every turn.

A. The District Court Applied a Fundamentally Flawed Legal Test and Reached a Fundamentally Flawed Conclusion.

To prevail on either an intentional-vote-dilution claim (as they did on CD27) or racial-gerrymandering claim (as they did on CD35), the plaintiffs had a significant burden of proof. *See, e.g.*, *Shaw v. Reno*, 509 U.S. 630, 641 (1993) (intentional vote dilution); *Miller*, 515 U.S. at 916 (racial gerrymandering). This Court decades ago established the legal standard of discriminatory intent for intentional-vote-dilution claims:

> "Discriminatory purpose" . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at

> least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.

Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979). Unless and until the plaintiffs proved that the 2013 Legislature acted with a racially discriminatory purpose, Defendants had no burden to prove anything. *Cf. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270 n.21 (1977) (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977)). Similarly, a racial-gerrymandering claim requires the plaintiffs to prove "that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Miller*, 515 U.S. at 916.

The district court did not ask whether the plaintiffs proved that the Legislature acted for the purpose of harming minority voters because of their race when it enacted Plan C235. Nor did the court ask whether the plaintiffs proved that the Legislature had a racially predominant motive when it enacted Plan C235. Instead, the district court framed the question as whether *the State* affirmatively proved that the Legislature "removed" the "taint of discriminatory intent" that purportedly infected Plan C235—even though Plan C235 was not drawn by the Legislature, but was imposed *by the court itself*. J.S. App. 46a. Setting aside the problem that there is not and never was any "taint" for the Legislature to remove, *see infra* Part III, that reversal of burdens of proof—and even chronology—is flawed in every respect.

At the outset, requiring States to affirmatively prove that the Legislature removed the "taint" of an earlier

Legislature's "discriminatory intent" cannot be reconciled with "the presumption of good faith that must be accorded legislative enactments," or with the courts' duty to "exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race." *Miller v. Johnson*, 515 U.S. 900, 916 (1995). That presumption of good faith means that the *plaintiffs* bear the burden of proving unlawful intent, and that any doubt must be resolved in favor of the Legislature. *Id.* The presumption carries particular weight in the context of redistricting legislation because "reapportionment is primarily the duty and responsibility of the State," *Chapman v. Meier*, 420 U.S. 1, 27 (1975), and "[f]ederal-court review of districting legislation represents a serious intrusion on the most vital of local functions," *Miller*, 515 U.S. at 915. That presumption does not cease to exist just because a *different* Legislature purportedly acted with discriminatory intent when enacting a law designed to address the same matter.

Moreover, the notion that Legislatures must "cleanse" legislation of past "discriminatory intent" makes no sense. To be sure, impermissible discriminatory *effect* may be carried over (whether intentionally or unwittingly) from one version of a law to another. But discriminatory *intent* is not forever ingrained in a statute; it is a *motive* question that turns on *why* the Legislature enacted the law—a question that may have a different answer depending on which Legislature enacted it. Accordingly, while a Legislature may be required to eliminate any vestiges of impermissible discriminatory

effect that resulted from an earlier Legislature's discriminatory intent, to ask them to "cleanse" otherwise-lawful legislation of an unlawful "intent" is nonsensical, as a law does not contain intent independent from the Legislature's reasons for enacting it.

What the district court really seemed to be saying is that the Legislature must affirmatively change the *substance* of any law that includes features that were previously included in a law enacted with impermissible intent. In other words, the district court effectively imposed a rule that a State can *never* enact provisions that were once included in a different law enacted for discriminatory purposes—even if the provisions have no discriminatory effect and the State's motives are now pure. That result would be at considerable odds with the skepticism this Court has expressed "of a claim that seeks to invalidate a statute based on a legislature's unlawful motive but does so without reference to the content of the legislation enacted." *LULAC v. Perry*, 548 U.S. 399, 422 (2006).

But in all events, while the district court's analysis would be flawed in any context, it cannot possibly justify invaliding Plan C235, because that plan was not enacted by some earlier Legislature with a forbidden intent, but rather was *imposed by the district court itself*. To be sure, Plan C235 carried over some of the same lines as the plan originally enacted by the 2011 Legislature. But that is only because the district court concluded that those lines likely violated neither the Constitution nor the VRA. Indeed, the whole point of ordering Texas to use the court-endorsed remedial Plan C235 in the 2012

elections was to ensure that Texas would be using a plan that was "cleanse[d]" of any "discriminatory intent or legal defect," J.S. App. 40a, that the 2011 plan might have contained. That "cleansing" was precisely what the remedial plan was supposed to accomplish under this Court's mandate "to draw interim maps that do not violate the Constitution or the Voting Rights Act." *Perez*, 565 U.S. at 396.

And that "cleansing" is exactly what the district court *said* Plan C235 accomplished when the court *ordered* Texas to use it in its 2012 elections: the court affirmatively concluded that "C235 is not purposefully discriminatory," and that "C235 adequately addresses Plaintiffs' § 2 claims." J.S. App. 408a, 423a. The 2013 Legislature cannot plausibly be faulted for failing to "cleanse" Plan C235 of the lingering "taint" of the 2011 Legislature's purportedly discriminatory intent when the court itself concluded that it had done just that in drawing and imposing Plan C235.

The district court's only explanation for its bizarre conclusion that *the court* could impose Plan C235 without engaging in intentional discrimination, but *the Legislature* could not do the same, was that the court's 2012 remedial decision was not a *definitive* resolution of potential challenges to the districts in Plan C235. But that, once again, confuses discriminatory intent and discriminatory effect. While the court's 2012 decision certainly did not insulate Plan C235 from future challenge on the ground that the court unwittingly imposed a plan that had impermissible *effects*, the relevant question under the *intent* test is not whether the plan actually suffered

from statutory or constitutional defects, but whether the 2013 Legislature adopted the plan for the *purpose* of discriminating on the basis of race. Plainly, it did not.

Indeed, the Legislature could not have been clearer about its motivation for enacting Plan C235: it believed that embracing as its own a map that came with the imprimatur of a federal court acting under a mandate "to draw interim maps that do not violate the Constitution or the Voting Rights Act," *Perez*, 565 U.S. at 396, was its best chance at bringing this litigation to a close and ensuring that its plan would comply with the Constitution and the VRA. And the Legislature acted well within the bounds of good faith in reaching that conclusion, as it is hard to imagine more persuasive evidence that a map complies with the Constitution and the VRA than a district court order explicitly finding that the map likely does.

Moreover, the record before the district court reinforced that conclusion. The court imposed Plan C235 only after receiving extensive evidence over several weeks, including from the plaintiffs in this case, confirming that the plan remedied any potential concerns. For instance, MALDEF, an organization representing multiple plaintiffs, provided written testimony to the 2013 House Select Committee and Senate Select Committee that explained exactly how Plan C235 fixed every element of the 2011 plan that raised statutory or constitutional concerns.[2] *See* J.S. App. 436a. The 2013 Legisla-

---

[2] MALDEF informed the committee that Plan C235 addressed the D.C. court's concern about intentional discrimination in

ture could hardly ask for better legal advice about pending redistricting legislation. The record thus confirms that the simplest and most straightforward conclusion about the 2013 Legislature's purpose is the correct one: the Legislature adopted Plan C235 in an effort to enact a permanent congressional plan that complied with the VRA and the Constitution.

B. The District Court's Intentional Discrimination Finding Defies Law, Logic, and Fact.

The district court resisted that conclusion, instead spinning a convoluted story in which the 2013 Legislature adopted the court-ordered map because it secretly knew that the map had *not* actually "cleansed" the "taint" with which the 2011 Legislature purportedly infected it, and sought to deprive the court of the ability to cure that defect in the future. Tellingly, the only "evidence" the court identified for that dubious conclusion was its view that Defendants were arguing that the Legislature's mere decision to adopt the remedial map as its own "insulated" both that map and the 2011 map "from

---

CD23 by restoring it to benchmark performance levels. J.S. App. 437a. In Dallas-Fort Worth, Plan C235 remedied claims of intentional discrimination by curing "the fracturing of minority voters in DFW." *Id.* Plan C235 addressed claims of intentional discrimination in districts represented by African-American and Latino incumbents by ensuring that incumbents' homes and district offices were located in their districts. *Id.* at 438a. Finally, MALDEF explained that Plan C235 addressed retrogression by restoring CD23's performance and creating CD33, as a result of which "[t]he court's interim plan contains 12 minority ability to elect districts." *Id.*

review." J.S. App. 45a. That is a gross mischaracterization of Defendants' position. Defendants have never argued that the mere adoption of Plan C235 "insulates" it from all judicial review. They have argued only that the plaintiffs' unlawful *purpose* accusations fail on the merits because Plan C235 was enacted to try to cure potential defects in the 2011 plan, not to purposefully discriminate.

As for the 2011 plan, the repeal of that plan should indeed have "insulated" it from judicial review, *see infra* Part II.B, but there is nothing remotely unusual, let alone nefarious, about that. That is just a consequence of ordinary mootness principles, under which (absent unusual circumstances not present here, like actions capable of repetition yet evading review) the repeal of a law moots challenges to it. Far from suggesting any impermissible purpose, repealing a law that has met with legal challenges deemed "not insubstantial" by a federal court is a conciliatory measure that should be encouraged. Moreover, the district court can hardly claim that the decision to *repeal* the 2011 plan was evidence of intentional discrimination when the court found that the initial decision to *defend* that plan was evidence of intentional discrimination too. *See* J.S. App. 41a (faulting the State because it "did not accept [the §5 court's rulings] and instead appealed to the Supreme Court"). After all, there must have been *something* the Legislature could do with the 2011 map that the district court would not label intentional discrimination.

Of course, under the district court's misguided analysis, the Legislature really was condemned either way.

Indeed, it is quite telling that the district court never explained how the 2013 Legislature could have "cleansed" the 2011 plan of the "taint of discriminatory intent" that the district court perceived. Instead, the court faulted the Legislature for failing to "engage in a deliberative process to ensure that the 2013 plans cured any taint from the 2011 plans." J.S. App. 40a. The suggestion that the Legislature had a duty to engage in an unspecified "deliberative process"—as opposed to moving quickly to adopt the remedial plan as its own and move on to other legislative priorities—is itself mistaken. *See Bush v. Vera*, 517 U.S. 952, 966 (1996) (plurality op.) (the Constitution does not "require States engaged in redistricting to compile a comprehensive administrative record"); *accord id.* at 1026 (Stevens, J., dissenting).

But in all events, the 2013 Legislature *did* engage in a deliberative process—and one that "cured" any relevant "taint" in the most definitive of ways: it repealed the 2011 plan entirely, and replaced it with the district court's remedial plan. That plan, which made extensive substantive changes to the 2011 plan, resulted from a protracted deliberative process in court involving multiple groups of plaintiffs with weeks of district-court proceedings, and from this Court's intervening decision in *Perry v. Perez*, which instructed the district court to draw remedial maps "that do not violate the Constitution or the Voting Rights Act." *Perry*, 565 U.S. at 396. If repealing a purportedly discriminatory law and replacing it with a law that has received the imprimatur of a federal court does not suffice to remove any lingering "taint," then it is difficult to imagine what could.

The district court's discriminatory purpose analysis thus provides no clue as to what the State could have done to eliminate the supposed taint from its congressional districts. The 2013 Legislature repealed the 2011 plans; it replaced them with court-ordered plans that substantially reconfigured nine congressional districts challenged by the plaintiffs, as well as several adjacent districts. Yet under the district court's standard, the Legislature's decision to accede to the remedial map and move on only provided further evidence of discriminatory intent. The only path that the district court even suggests might plausibly "cure" the "taint" is confession of error, which implies that a subsequent legislature can *never* remove taint by substantially amending a statute—even if that law does not actually have a discriminatory effect. *See* J.S. App. 41a (citing failure to prove "a change of heart concerning the validity of any of Plaintiffs' claims"). That cannot possibly be the law, and it would raise significant constitutional concerns if it were.

At bottom, the Legislature's decision to embrace the district court's remedial map was exactly what it purported to be: an effort to comply with the Constitution and the VRA and bring protracted litigation to an end. The 2013 Legislature had a keen sense of the costs of continuing litigation and a seemingly obvious mechanism to ensure that future congressional elections would be conducted under lawful districts. Rather than continuing the litigation over the 2011 maps, the Legislature accepted the court-ordered Plan C235 as to both the lines that changed and the lines that the court did not find a basis to change. That action, particularly when viewed

through the lens of the presumption of good faith and validity, is conciliatory, not unconstitutional. The district court concluded otherwise only by ignoring the presumption of good faith, imposing an impossible-to-satisfy remove-the-taint rule, and holding the Legislature to an even higher standard when drawing maps than the court itself.

III. Plan C235 Is Not and Never Was Infected By Any Discriminatory "Taint."

Even setting aside the more fundamental problems with the district court's remove-the-taint rule, the court's order must be reversed for the simple reason that Plan C235 is not and never was infected by any discriminatory "taint." The district court concluded otherwise only by adjudicating moot challenges to a repealed plan and embracing findings with no support in law or fact.

A. The District Court's "Taint" Finding Is Grounded in an Impermissible Advisory Opinion.

At the outset, the district court's conclusion that Plan C235 was infected with lingering "taint" in need of "cleansing" rests entirely on an advisory opinion that the court had no authority to enter. The district court's "taint" theory is based on its March 2017 opinion adjudicating challenges to the 2011 map (Plan C185). But the court never should have been adjudicating those claims in the first place because the 2011 map was *repealed* four years earlier, when the Legislature replaced it with Plan C235. Any challenges to that now-repealed plan thus

were mooted years ago. *See Davis*, 781 F.3d at 220 (holding that the 2013 Texas Legislature's repeal of the 2011 Senate plan mooted claims against the plan).

Indeed, the 2011 plan never affected *any* voter because it was never precleared, never took legal effect, and was never used in an election. *See, e.g.*, *Connor v. Waller*, 421 U.S. 656, 656 (1975) (per curiam) (holding that challenged acts "are not now and will not be effective as laws until and unless cleared pursuant to § 5"); *Branch v. Smith*, 538 U.S. 254, 283-84 (2003) (Kennedy, J., concurring). The Legislature repealed the 2011 plan before it took effect and before the district court entered final judgment on the merits—indeed, before the district court even had jurisdiction to rule on the merits of claims against Plan C185. *See, e.g.*, *Waller*, 421 U.S. at 656 (holding, where laws had not been precleared, that the district court "erred in deciding the constitutional challenges to the Acts based upon claims of racial discrimination"), *quoted in Branch*, 538 U.S. at 283 (Kennedy, J., concurring) ("Where state reapportionment enactments have not been precleared in accordance with § 5, the district court 'err[s] in deciding the constitutional challenges' to these acts."). Accordingly, when the 2013 Legislature enacted Plan C235 and repealed Plan C185, Defendants moved to dismiss all claims against the 2011 plan for lack of subject-matter jurisdiction, and they have continued to argue throughout this litigation that any opinion on the merits of those claims is an impermissible advisory opinion that the district court lacked jurisdiction to enter.

The district court refused to dismiss the plaintiffs' claims against the 2011 plan as moot. As is clear, however, that refusal had nothing to do with the 2011 plan and everything to do with the 2013 plan. In the district court's view, the plaintiffs had been harmed not by Plan C185 itself, but because "mapdrawers [in 2011] acted with an impermissible intent to dilute minority voting strength or otherwise violated the Fourteenth Amendment," and "Defendants were continuing to engage in exactly such conduct *when they adopted the interim plans in 2013*." J.S. App. 125a. In other words, the district court adjudicated moot challenges to the 2011 plan for the acknowledged purpose not of remedying any injury caused by *that* plan (there was none), but merely as a means of laying the groundwork to find purported "taint" for the 2013 Legislature to cure. That was clear legal error. The court could not adjudicate moot challenges to a plan that no longer existed just to lay the predicate for adjudicating different claims entirely.

That the plaintiffs were seeking the remedy of VRA §3(c) preclearance "bail-in" does not change the analysis. Bail-in is a remedy, not a claim. As this Court has made clear, the right to a remedy does not arise until after the plaintiff prevails on a claim, and thus cannot substitute for an Article III *injury*. In *Vermont Agency*, the Court held that "an interest that is merely a 'byproduct' of the suit itself cannot give rise to a cognizable injury in fact for Article III standing purposes." *Vermont Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 773 (2000). There, the Court rejected the notion that a *qui tam* rela-

tor's interest in recovering a monetary reward can provide Article III standing, explaining that it is not related to any concrete injury-in-fact. To provide standing, "[t]he interest must consist of obtaining compensation for, or preventing, the violation of a legally protected right." *Id.* at 772. A *qui tam* relator's potential bounty cannot provide standing because it does not remedy an invasion of his personal legal rights—"the 'right' he seeks to vindicate does not even fully materialize until the litigation is completed and the relator prevails." *Id.* at 772-73.

The same goes for a voting-rights plaintiff's interest in seeing a State bailed into preclearance under §3(c). To seek bail-in, the plaintiff must first prevail on the merits of a constitutional claim for which that remedy is sought. Accordingly, a plaintiff may seek bail-in as a remedy only for a claim that satisfies Article III's case-or-controversy requirement. *See, e.g., Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 175-78 (2011). Here, the threat of injury from the 2011 redistricting plan disappeared when the Legislature repealed it. The plaintiffs' request that the district court reimpose preclearance on the State under §3(c) thus could not keep their moot challenges to the repealed 2011 plan alive, and the district court's opinion adjudicating those moot claims is an impermissible advisory opinion that cannot serve as the predicate for adjudicating claims against a different plan adopted by the district court and then enacted by the 2013 Legislature.

B. There Is Not and Never Was Any Vote Dilution in CD27.

Even assuming the district court had jurisdiction to adjudicate the plaintiffs' moot challenges to the 2011 map, and even assuming the 2013 Legislature could be charged with discriminatory intent for failure to "cure" purported "taint" carried over into Plan C235 from the 2011 map, there is not and never was any unlawful vote dilution in CD27.

Intentional vote dilution requires proof of both discriminatory intent and vote-dilutive effect. *Shaw*, 509 U.S. at 641 (explaining that redistricting plans "violate the Fourteenth Amendment when they are adopted with a discriminatory purpose and have the effect of diluting minority voting strength"). This Court has long defined vote-dilutive effect as "the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of [the minority group's] choice." *LULAC*, 548 U.S. at 430 (quoting *Johnson v. De Grandy*, 512 U.S. 997, 1008 (1994)). The Court has thus held that VRA §2 cannot require a minority opportunity district unless the minority population in that potential district would make up a 50% majority. *Bartlett v. Strickland*, 556 U.S. 1, 19 (2009). Accordingly, if there is not a compact minority population that would make up at least 50% of the hypothetical additional district, then there is no vote-dilutive *effect*, and thus no vote dilution—intentional or otherwise.

In six years of litigation, the plaintiffs have never been able to draw a proposed congressional plan that

would create more than seven reasonably compact Hispanic opportunity districts in South and West Texas, which is exactly what Plan C235 creates. *See* J.S. App. 127a-131a (finding that the plaintiffs "fail[ed] to demonstrate that an additional compact Latino opportunity district could be drawn in South/West Texas"). Accordingly, the district court itself found that Plan C235 did *not* dilute Hispanic voting strength in the region as a whole. The district court also recognized that CD27 in particular does "not diminish Hispanic voter opportunity for § 2 effects purposes," because relocating "Nueces County Hispanics" to another South Texas district would not lead to the creation of an additional Hispanic opportunity district. *Id.* at 113a. But that recognition should have led the court to the conclusion that the Hispanic population in Nueces County is not sufficiently numerous to satisfy the first prerequisite for a vote-dilution claim under *Thornburg v. Gingles*, 478 U.S. 30 (1986). *See* J.S. App. 114a & n.86. Without that showing, "there neither has been a wrong nor can be a remedy." *Bartlett*, 556 U.S. at 15 (quoting *Growe v. Emison*, 507 U.S. 25, 41 (1993)). Without proof of actual vote-dilutive effect, there is no basis to find vote dilution in CD27.

Even if there were evidence that CD27 had a vote-dilutive *effect*, moreover, there was *no* evidence of *intentional* vote dilution. The district court inferred that Nueces County Hispanic voters "were intentionally deprived of their opportunity to elect candidates of their choice" from the mere fact that the 2011 Legislature knew that CD27 would no longer be a Hispanic opportunity district. J.S. App. 112a; *see also id.* at 191a. But

this awareness does not imply that any legislator, let alone the Legislature as a body, intentionally targeted Hispanic voters in Nueces County on account of their race.[3] *See Feeney*, 442 U.S. at 279 ("'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences.") (citation and footnote omitted).

As this Court has admonished repeatedly, "the legislature always is aware of race." *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 797 (2017) (quoting *Shaw*, 509 U.S. at 646). That alone is not enough to prove intentional discrimination. If it were, States would be required to lock-in and retain all previously existing minority opportunity districts—a requirement found nowhere in the Constitution or VRA §2.[4] The district court's finding of intentional vote dilution in CD27 therefore cannot be reconciled with this Court's precedents.

---

[3] The Legislature's purported failure to "substantially address the § 2 violation" that the district court found in 2017, J.S. App. 112a-113a, cannot make up for that deficit because the Legislature in 2013 was obviously unaware of that 2017 ruling when it enacted Plan C235. To the contrary, the only thing the legislature had before it was the district court's 2012 decision finding that CD27 was *not* discriminatory in purpose or effect, which at minimum provided a good-faith basis for the Legislature to believe that CD27 satisfied the VRA and the Constitution. *Id.* at 421a-422a.

[4] VRA §5's defunct retrogression standard could come closer to imposing something analogous to, but still short of, that rigid requirement. Even then, the D.C. district court hearing the VRA §5 claims here found no problem with CD27. 887 F.

C. CD35 Is Not A Racial Gerrymander.

The district court's ruling that CD35 is the product of racial gerrymandering is equally flawed. To prevail on a *Shaw* racial-gerrymandering claim, the plaintiff must prove that race was "the 'predominant factor' motivating the legislature's districting decision." *Hunt v. Cromartie*, 526 U.S. 541, 547 (1999). So "race for its own sake" must be "the overriding reason" for the decision to adopt a particular district, *Bethune-Hill*, 137 S. Ct. at 799, meaning that "the legislature 'subordinated' other factors . . . to 'racial considerations,'" *Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017) (quoting *Miller*, 515 U.S. at 916). If race is proven to be the predominant motive, strict scrutiny applies. *Cooper*, 137 S. Ct. at 1464. The State satisfies strict scrutiny if it had a "strong basis in evidence" to believe that the VRA required it to draw an additional minority opportunity district. *Id.* "[T]he requisite strong basis in evidence exists when the legislature has '*good reasons* to believe' it must use race in order to satisfy the Voting Rights Act." *Bethune-Hill*, 137 S. Ct. at 801 (quoting *Ala. Legis. Black Caucus v. Alabama*, 135 S. Ct. 1257, 1274 (2015)).

The first problem with the plaintiffs' racial gerrymandering claim is that the district court affirmatively found that "the 2013 Legislature did not draw the challenged districts in Plan C235." J.S. App. 34a. That bears repeating: The 2013 Legislature did not adjust any district lines or determine which voters to place "within or

---

Supp. 2d at 153 (explaining how the creation of CD34 offset changes to CD27).

without a particular district." *Miller*, 515 U.S. at 916; *see* J.S. App. 115a-116a ("There is no evidence that the Legislature again considered in 2013 which persons to include within CD35 . . . ."). Rather, the 2013 Legislature adopted wholesale the map imposed in 2012 by the district court (Plan C235). So the 2013 Legislature could not have "used race as a basis for separating voters into districts" because it did not make any "decision to place a significant number of voters within or without a particular district." *Miller*, 515 U.S. at 911.

Moreover, even assuming *arguendo* that race predominated back when *the 2011 Legislature* drew CD35, the 2013 Legislature's decision to enact a court-ordered plan that retained CD35 would readily survive strict-scrutiny review. The district court acknowledged that the Legislature had good reasons to create a new district along the corridor between Austin and San Antonio, where CD35 is located. J.S. App. 408a (finding it "undisputed that much of Texas's overall population growth occurred in Bexar County and Travis County and areas along the I-35 corridor").[5] And the 2013 Legislature had the best possible basis in evidence to believe that it

---

[5] CD35 is nothing like the District 25 that the Court invalidated in *LULAC*, 548 U.S. 399. District 25 was "a long, narrow strip that winds its way from McAllen and the Mexican-border towns in the south to Austin, in the center of the State and 300 miles away," and "[t]he Latino communities at the opposite ends of District 25 have divergent 'needs and interests.'" *Id.* at 424. CD35 connects Austin to San Antonio, less than 80 miles away, and is entirely within the growth corridor of Central Texas.

needed to readopt CD35 as a minority opportunity district: the district court's 2012 opinion explained that Plan C235 addressed the plaintiffs' claim that VRA §2 required "7 Latino opportunity districts in South/Central/West Texas" by creating seven such districts—one of which was CD35. J.S. App. 423a.

The district court nevertheless found that CD35 was racially gerrymandered, reasoning that because there is not racial bloc voting in Travis County, and because CD35 covers part of Travis County, VRA §2 could never justify drawing CD35 as an opportunity district encompassing any part of Travis County. *Id.* at 175a.[6] Setting aside the problem that the district court should have asked whether the *entire* territory covered by CD35 *as drawn*—and not a specific county, part of which is not in the district at issue—had racial bloc voting, *see Bethune-Hill*, 137 S. Ct. at 800 ("The ultimate object of the inquiry . . . is . . . the district as a whole."), this "hindsight" analysis ignores the governing legal standard. Strict scrutiny does not require a showing that the Legislature *had* to draw a minority opportunity district to satisfy the VRA.

---

[6] The district court noted that a portion of CD35 covered some territory in Travis County around Austin that had been in the former CD25, a crossover district. But the district court did not hold that CD35 was invalid, under a vote-dilution theory, because the Legislature eliminated a preexisting crossover district. *See* J.S. App. 111a. Nor could it have, as the Travis County Hispanic population in the previous crossover district was placed in CD35, a new Hispanic opportunity district, so this population could not possibly have suffered vote dilution.

Instead, it is enough that the Legislature had "good reasons" to believe it was necessary to do so.

Here, the Legislature had the best reason in the world to believe that it needed to draw CD35 as a minority opportunity district to comply with the VRA: the district court told the Legislature as much in 2012. If the district court had "good reasons" to believe that CD35 needed to be drawn as a minority opportunity district, then surely the Legislature did as well. Indeed, the whole point of the strong-basis-in-evidence standard is to "give[] States 'breathing room' to adopt reasonable compliance measures that may prove, *in perfect hindsight, not to have been needed.*" *Cooper*, 137 S. Ct. at 1464 (quoting *Bethune-Hill*, 137 S. Ct. at 802) (emphasis added). If a Legislature cannot even maintain a minority opportunity district when a district court has instructed that doing so is necessary to remedy a potential §2 violation, then the strict-scrutiny standard provides no breathing room at all.

CONCLUSION

The Court should note probable jurisdiction or in the alternative summarily reverse.

Respectfully submitted.

PAUL D. CLEMENT
ERIN E. MURPHY

KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant
Attorney General

SCOTT A. KELLER
Solicitor General
Counsel of Record

MATTHEW H. FREDERICK
Deputy Solicitor General

MICHAEL P. MURPHY
ANDREW B. DAVIS
Assistant Solicitors General

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
scott.keller@oag.texas.gov
(512) 936-1700

OCTOBER 2017